Supreme Court, U.S.
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NO.

In The
Supreme Court of the United States

October Term, 1995

GEORGE WICKS,
Petitioner,

VERSUS

MISSISSIPPI EMPLOYMENT SERVICE and HAZEL COOK,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there exists a "heightened pleading" requirement for actions brought under 42 USC § 1983 and 42 USC § 1981 against individuals.

2. Whether the "heightened pleading" requirement for actions brought against individuals under 42 USC § 1983 is consistent with *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit,* 507 U.S. ___, 122 L.Ed.2d 517, 113 S. Ct. 1169 (1993), which disallows the heightened pleading requirement for actions brought against municipalities under 42 USC § 1983.

3. Whether, in a 42 USC § 1983 suit charging racial discrimination, a Plaintiff must plead specific facts show ng racial bias.

TABLE OF CONTENTS

PAGE

Questions Presented i
Table of Contents.....ii
Table of Authorities.....iii
Opinion Below.....1
Jurisdiction 1
Federal Statute Involved.....1-2
Statement of the Case 2
Argument

THIS COURT SHOULD GRANT THE WRIT, SINCE THE FIFTH CIRCUIT'S HEIGHTENED PLEADING REQUIREMENT IS INCONSISTENT WITH THE RULE IN THE SEVENTH CIRCUIT AND INCONSISTENT WITH *LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT*, 507 U.S. ___, 122 L.Ed.2d 517, (1993).....3

Appendix 10

TABLE OF AUTHORITIES

CASES **PAGE**

Branch v. Tunnell, 937 F.2d 1382, 1386-87 (9th Cir. 1991) 4
Gomez v. Toledo, 446 U.S. 635 (1980) 5,6
Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).....6
Kimberlin v. Quinlan, 6 F.3d 789, rehr'g. denied, 17 F.3d. 1525 (9th Cir. 1994) (en banc).....6
Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit, 507 U.S. ___, 122 L.Ed.2d 517, 113 S. Ct. 1169 (1993).....i, 3, 4
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 5
Mitchell v. Forsyth, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985).....3
Patterson v. McLean Credit Union, 491 U.S. 164 (1989).....5,6
St. Mary's Honor Society v. Hicks, 509 U.S. ___, 125 L.Ed.2d 407 (1993).....6
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).....5
Triad Associates v. Robinson, 10 F.3d. 492, 497 (7th Cir. 1993).....4
Wicks v. Mississippi State Employment Services, 41 F.3d 991 (5th Cir. 1995).....passim
Wyatt v. Cole, 504 U.S. ___, 118 L.Ed.2d 504 (1992).....7

OTHER AUTHORITY

42 USC § 1981.....passim
42 USC § 1983.....passim
Federal Rule of Civil Procedure 8.....3, 5
Federal Rule of Civil Procedure 9.....5

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 41 F.3d 991 (5th Cir. 1995). It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 6, 1995. This Court has jurisdiction to review by Writ of Certiorari under 28 USC § 1254.

FEDERAL STATUTE INVOLVED

The federal statute involved is 42 USC § 1983, which says :

> Every person who, under color of any statute, ... subjects or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law...

STATEMENT OF THE CASE

Petitioner, George Wicks, a black person, filed an action in the United States District Court for the Northern District of Mississippi against his immediate supervisor, Hazel Cook, and his employer, the Mississippi State Employment Service ("MSES"). R.,4. He alleged that because of his race, he was denied a job that was awarded to a lesser qualified white person. R.,4.

In addition to claiming that the MSES was liable for racial discrimination under the Title VII of the Civil Rights Act of 1964, the complaint against Cook alleges:

> Hazel Cook customarily and habitually treated black employees in a less favorable fashion than white employees, and her adverse comments about Plaintiff, based upon race and based upon Plaintiff's protesting unjustified employment actions against him was also a proximate cause of Plaintiff's not getting a promotion.

R., 4.

Cook moved to dismiss the complaint on grounds of qualified immunity and moved to hold any discovery in abeyance pending action on the motion to dismiss. R., 20-30.

The Magistrate Judge entered an order permitting discovery on the issue of qualified immunity. R., 32. The District Judge affirmed the Magistrate's Order.

Contending that an order permitting discovery is, in effect, an appealable denial of qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), Cook appealed to the United States Court of

Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's order permitting discovery and held that Wicks' complaint was insufficient to state a racial discrimination claim. According to the Fifth Circuit, the Complaint must "'state with factual detail and particularity the basis for the claim which necessarily includes why the defendant cannot successfully maintain the defense of immunity'". 41 F.3d 997.

Since the Fifth Circuit's "heightened pleading" requirement is inconsistent with this Court's precedents and with the rule in the Seventh Circuit, Wicks requests this Court to review the decision of the Fifth Circuit.

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT, SINCE THE FIFTH CIRCUIT'S HEIGHTENED PLEADING REQUIREMENT IS INCONSISTENT WITH THE RULE IN THE SEVENTH CIRCUIT AND IS INCONSISTENT WITH *LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT,* 507 U.S. ___, 122 L.Ed.2d 517 113 (1993).

The Fifth Circuit holds that a charge of race discrimination made against a supervisor, under 42 USC § 1981 and 42 USC § 1983, is subject to a "heightened pleading" requirement, rather than the notice pleading requirement of FRCP 8. As the Fifth Circuit said:

> [T]he complaint must "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity. Wicks' complaint is devoid of such detail; accordingly, we conclude that Wicks has failed to state a racial discrimination claim sufficient to overcome Cook's defense of qualified immunity.

41 F.3d at 997.

The Fifth Circuit rule is contrary to the law in the Seventh Circuit. *Triad Associates v. Robinson,* 10 F.3d 492, 497 (7th Cir. 1993), held:

> In this circuit, on a motion to dismiss (on qualified immunity grounds), we require no more from Plaintiff's allegations of intent than would satisfy Rule 8's notice pleading minimum and Rule 9(b)'s requirement that motive and intent be pleaded generally. See *Elliot v. Thomas,* 937 F.2d 338 (7th Cir. 1991)....

However, other circuits follow some version of the Fifth Circuit's "heightened pleading" requirement. See *Kimberlin v. Quinlan,* 6 F.3d 789, rehr'g. denied, 17 F.3d 1525 (D.C. Cir. 1994) (en banc), (D.C. Circuit follows "heightened pleading" requirement; furthermore, complaint must contain "direct evidence"; circumstantial evidence is not enough.); *Branch v. Tunnell,* 937 F.2d 1382, 1386-87 (9th Cir. 1991) (Ninth Circuit follows "heightened pleading" requirement, but permits circumstantial evidence to meet this pleading burden.)

The Fifth Circuit's heightened pleading rule is inconsistent with *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit,* 507 U.S. ___, 122 L.Ed.2d 517 (1993). *Leatherman* held that the heightened pleading requirement in 42 USC Sec. 1983 suits against municipalities cannot be "squared" with FRCP 8, which requires only a "short and plain" statement of the claim, nor with FRCP 9, which limits the requirement of fact-specific pleading to claims involving "fraud". See FRCP 9(b) (intent may be pled generally).

The Fifth Circuit's "heightened pleading" requirement is also inconsistent with *Gomez v. Toledo,* 446 U.S. 635 (1980). *Gomez* held that since qualified immunity "depends upon facts peculiarly within the Defendant's knowledge and control", the burden of pleading and proving a qualified immunity defense is on the Defendant. But the Fifth Circuit held that the *Plaintiff's* pleadings

must "necessarily include why the defendant-official cannot successfully maintain the defense of immunity". 41 F.3d. at 997. Since this Court has never overruled *Gomez*, the Fifth Circuit's requiring Plaintiff's complaint to negate a good faith defense is a refusal to follow a decision of this Court.

Additionally, the Fifth Circuit's holding cannot be reconciled with this Court's precedents as to how a racial discrimination case may be proved. This Court has repeatedly held that a fact-finder *may* infer racial discrimination from the fact that the reasons given by the employer for preferring the white applicant are a "pretext". *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 125 L.Ed.2d 407 (1993). Under these decisions, once a black Plaintiff made a prima facie case by showing he was qualified, but that a white person was given the position, the defendant is required to "articulate" a lawful reason for the employment decision. As *Hicks* stated:

> Thus, the *McDonnell-Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case, i.e., adverse employment actions were taken for a "legitimate, non-discriminatory reason". *Burdine*, 450 U.S. at 254.

125 L.Ed.2d at 416

Here, through its "heightened pleading" rule, the Fifth Circuit had negated a method for proving discrimination that this Court has repeatedly approved. Under the Fifth Circuit's rule, the Plaintiff in a 42 USC § 1983 or 42 USC § 1981 race discrimination case cannot even survive a Motion to Dismiss unless he pleads facts proving discriminatory intent. Contrary to this Court's precedents, the Defendant is not required to "articulate" a reason for preferring a white applicant. Contrary to this Court's statement in *Gomez* that the facts concerning how the employment decisions

are peculiarly within Defendant's knowledge, a Plaintiff's case will be dismissed unless he pleads facts which prove racial discrimination.

The very reason this Court created the *McDonnell-Douglas* shifting burden rule was the near impossibility of proving racial discrimination through direct evidence. Now, through a "heightened pleading" rule, the Fifth Circuit has undermined this Court's approved methods of proving race discrimination. See *Patterson v. McLean Credit Union, supra (McDonnell-Douglas* "shifting burden" rule applies in a 42 USC § 1981 case).

Other basics of civil rights law are also called into question by the Fifth Circuit's "heightened pleading" rule. The Fifth Circuit requires the pleading of sufficient facts to escape qualified immunity. However, it is fundamental that a qualified immunity defense considers the law, not the facts. Qualified immunity exists when the defendant's actions are not contrary to "clearly established law". *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The Fifth Circuit has misapplied the qualified immunity doctrine by construing that doctrine as involving a determination as to whether the Plaintiff has sufficient facts to prove his case. Under *Harlow,* the question of qualified immunity depends upon whether the law alleged to be violated was clearly settled.

Finally, the qualified immunity doctrine is designed to protect public officials exercising "discretionary" functions so as to assure that they not be deterred from acceptance of public office. The rational of qualified immunity is to see that public officials not be deterred from engaging in the "unflinching discharge of their duties". *Harlow,* at 814. But this case involves only an employment supervisor, not a policy-making official. This supervisor's job functions are not different from those of an office manager at a private business. To hold that a supervisor, performing an identical function to functions performed by a private office supervisor, is somehow a "public official" deserving of qualified immunity, conflicts with this Court's precedents. This Court employs a "func-

tional approach" in determining qualified immunity. See *Wyatt v. Cole*, 504 U.S. ___, 118 L.Ed.2d 504 (1992) (Qualified Immunity did not apply to private party because private party does not perform discretionary governmental functions bringing qualified immunity considerations into play).

CONCLUSION

The Fifth Circuit's heightened pleading rule, as applied in favor of an employment supervisor in a racial discrimination case, cannot be reconciled with this Court's precedents. This Court should grant the Writ and reverse the Fifth Circuit's requirement for "heightened pleading" in an action against an employment supervisor.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit
No. 94-60337

George WICKS, Sr., Plaintiff-Appellee,
v.
MISSISSIPPI STATE EMPLOYMENT SERVICES, et al.,
Defendants,

Hazel Cook, Defendant-Appellant.
No. 94-60337
Summary Calendar.

Appeal from the United States District Court
for the Northern District of Mississippi
(1:94CV 2-S-D)

Before POLITZ, Chief Judge, KING and STEWART, Circuit Judges.

POLITZ, Chief Judge:

Hazel Cook appeals the district court's denial of a protective order preventing all discovery prior to consideration of her motion to dismiss. For the reasons assigned, we reverse and remand for further proceedings consistent herewith.

Background

George Wicks, Sr., an African-American male, applied for a management position with his employer, the Mississippi State Employment Service. The promotion was given to a white employee. Wicks filed suit against MSES and Hazel Cook, a former supervisor of Wicks, asserting both a racial discrimination claim[1] and a first amendment claim.[2] On April 13, 1994 Cook

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1. 42 U.S.C. § 1981 (Supp. III 1991).
2. 42 U.S.C. § 1983 (1988). Wicks also asserted a claim under Title VII of the Civil Rights Act of 1964 against the MSES. That claim is not an issue in this appeal.

contemporaneously filed two motions: (1) a "Motion to Dismiss, or in the Alternative, for Summary Judgement," which asserted the defense of qualified immunity[3] and (2) a "Motion to Hold Discovery in Abeyance" pending the consideration of Cook's qualified immunity defense.

With the motion to dismiss pending before the district court, the discovery motion was referred to a magistrate judge who issued an order staying all discovery except for that related to Cook's defense of qualified immunity. Cook objected to this united discovery order and the district court affirmed the magistrate judge.

Cook appeals the order allowing discovery on the issue of qualified immunity. The motion to dismiss remains pending before the district court.

Analysis

Wicks vigorously maintains that we are without subject matter jurisdiction to hear this appeal of a discovery order. "Ordinarily, an order compelling limited discovery is interlocutory and not appealable under the final judgement rule...."[4] The Supreme Court has held, however, that orders denying substantial claims of qualified immunity are immediately appealable under the collateral order doctrine.[5] Cook equally vigorously contends that in allowing limited discovery on the issue of qualified immunity, the district court effectively has denied her the benefits of the qualified immunity defense, the most relevant being the protection from pretrial discovery.[6] Thus, she argues, the district court's order is

3. "Although the statutory language of § 1983 does not expressly provide for an immunity defense, courts have consistently held that 'government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.'" *Geter v. Fortenberry (Geter I)*, 849 F.2d 1550, 1552 (5th Cir. 1988) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727. 2731. 73 L.Ed.2d 396 (1982)).

4. *Lion Boulos v. Wilson*, 834 F.2d 504, 506 (5th Cir. 1987) (citing 28 U.S.C. § 1291 (1986)).

5. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

6. *Helton v. Clements*, 787 F.2d 1016 (5th Cir. 1986).

appealable immediately under the collateral order doctrine and this court has appellate jurisdiction. We hold today that the discovery order denied Cook the benefits of the qualified immunity defense, thereby vesting this court with the requisite jurisdiction to review the discovery order.[7]

In *Lion Boulos v. Wilson,* we held that a party asserting the defense of qualified immunity is not immune from all discovery, only that which is "avoidable or overly broad."[8] We stated that when the district court "is unable to rule on the immunity defense without further clarification of the facts" and when the discovery order is "narrowly tailored to uncover only those facts needed to rule on the immunity claim," an order allowing such limited discovery is neither avoidable nor overly broad.[9] Under those conditions, we held that the appellate court was without jurisdiction to review the discovery order.

Discovery under *Lion Boulos,* however, must not proceed until the district court *first* finds that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity. [10] This heightened pleading requirement, first articu-

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7. *Mitchell.*

8. 834 F.2d at 507

9. *Id.* at 507-08. The *Lion Boulos* court noted that when the assertion of the qualified immunity defense turned purely on a question of law, the district court should rule on the motion to dismiss without discovery. *Id.* at 508. The same would be true if the facts upon which the defense of qualified immunity turned were not disputed by the parties. *See Anderson v. Creighton,* 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 3042 n. 6, 97 L.Ed.2d 523 (1987) ("[I]f the actions Anderson claims he took are different from those the Creightons allege...then discovery may be necessary before Anderson's motion for summary judgement on qualified immunity grounds can be resolved").

10. *Foster v. City of Lake Jackson,* 28 F.3d 425, 428 (5th Cir. 1994) ("The burden of negating the defense lies with the plaintiffs."); *Geter I,* 849 F.2d at 1554 ("Where a plaintiff's pleadings assert facts which, if proven, would defeat a qualified immunity defense, limited discovery may be permitted tailored to the issue of qualified immunity."); *Lion Boulos* (citing *Elliott v. Perez,* 751 F.2d 1472 (5th Cir. 1985)); *Brown v. Texas A&M Univ.,* 804 F.2d

lated in *Elliot v. Perez,*[11] requires Wicks to allege the particular facts forming the basis of his claim, including those preventing Cook from successfully maintaining a qualified immunity defense. To overcome the immunity defense, the complaint must allege facts that, if proven, would demonstrate that Cook violated clearly established statutory or constitutional rights.[12] Heightened pleading demands more than bald allegations and conclusionary statements.[13] Wicks must allege facts specifically focusing on the conduct of Cook which caused his injury.[14]

If Wicks' complaint falls short of this standard, the district court should rule on the motion to dismiss before any discovery is allowed.[15] The allowance of discovery without this threshold showing is immediately appealable as a denial of the true measure of protection of qualified immunity.[16] If the complaint alleges

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327, 333 (5th Cir. 1986) ("[T]he issue of qualified immunity is a threshold question, and '[u]ntil this threshold immunity question is resolved, discovery should not be allowed.'") (citing *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2738 (1982)). *See also Jacques v. Procunier*, 801 F.2d 789 (5th Cir. 1986).

11. 751 F.2d 1472 (5th Cir. 1985 (citing *Leatherman v. Tarrant County Narcotics Unit.* — U.S. —, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)), Wicks contends that the heightened pleading standard cannot be reconciled with the concept of notice pleading set forth in the Federal Rules of Civil Procedure. We note, however, that the *Leatherman* decision expressly refrained from considering "whether [its] ... qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at —, 113 S.Ct. at 1162. In the absence of such a ruling, we are bound to follow the decisions of prior panels which have required plaintiffs to meet the heightened standard. *Schultea v. Wood*, 27 F.3d 1112 (5th Cir. 1994), *reh'g en banc granted* (Aug. 26, 1994). *See also Branch v. Tunnell*, 14 F.3d 449 (9th Cir.) (holding that panel is bound by prior panel's adoption of heightened pleading because *Leatherman* did not undermine that precedent), *cert. denied*, — U.S. —, 114 S.Ct. 2704, 129 L.Ed.2d 832 (1994).

12. *Jacques* (citing *Harlow).*

13. *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990).

14. *Jacquez.*

15. *See Geter I*, 849 F.2d at 1554 ("Where a plaintiff's pleadings assert facts which, if proven, would defeat a qualified immunity defense, limited discovery may be permitted tailored to the issue of qualified immunity."); *Geter v. Fortenberry (Geter II)*, 882 F.2d 167 (5th Cir. 1989) (accord).

16. In its decisions in *Harlow and Mitchell*, the Supreme Court made clear

facts to overcome the defense of qualified immunity, the district court may then proceed under *Lion Boulos* to allow the discovery necessary to clarify those facts upon which the immunity defense turns.[17]

Thus, the initial step in our review requires an examination of Wicks' complaint to see if his allegations negate Cook's defense of qualified immunity. In so doing, we find two allegations against Cook violated his first amendment rights by discriminating against him because of his protests of two reprimands issued by Cook. His complaint states:

> [T]he fact that Plaintiff [Wicks] had exercised his First Amendment rights by appealing and protesting two unjustified write-ups given him by the Defendant, Hazel Cook, Plaintiff's supervisor, also contributed to the failure to get the promotion. Hazel Cook contributed to Plaintiff's failure to get the promotion because she entertains a hostility toward Plaintiff because of his protesting the unjustified write-ups that she had given him.
>
> • • • • •
>
> [H]er adverse comments about Plaintiff, ... based upon Plaintiff's protesting unjustified employment actions against him was [sic] also a proximate cause of Plaintiff's not getting the promotion.

Our decisions have established that a public employee asserting a first amendment claim against his employer must show that the speech in question involves a matter of public concern, that his interest in commenting upon those matters is greater than the defendant's interest in promoting efficiency in delivery of public services, and that his speech motivated the defendant's offensive

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that immunity means more than just immunity from the burdens of defending a suit, including the burdens of defending a suit, including the burdens of pretrial discovery. Thus, "courts have an obligation to carefully scrutinize a plaintiff's claim before subjecting public officials to the burdens of broad reaching discovery." *Jacquez*, 801 F.2d at 791. The failure to do so is immediately appealable under *Mitchell*.

17. *Lion Boulos; Geter I*

acts.[18]

Wicks' allegations fail to suggest how Cook violated his clearly-established first amendment rights. The most expansive reading of his complaint discloses no basis for a finding that his charges about poor "write-up" are a matter of public concern. Moreover, the allegation that his speech motivated Cook's tortious acts is wholly conclusionary. Nor did Wicks allege exactly what he believes Cook did to prevent his promotion.[19] The gravamen of Wicks' complaint appears to be nothing more than an attempt to redress a personal grievance, a claim not generally actionable against a public employer.[20]

Wicks also complains that Cook discriminated against him on the basis of race,[21] stating in his complaint that:

> Hazel Cook customarily and habitually treated black

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18. *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir. 1990).

19. Wicks argues in brief that Cook "poisoned the well" by making adverse verbal comments and by making "unjustified and unsubstantiated negative written reports" while his supervisor. Whereas these arguments may be more specific, we may not consider them because they do not appear in the pleadings, the focal point of the inquiry under *Elliot*.

20. *Thompson*, 901 F.2d at 461 ("The rationale behind the public concern requirement is to prevent public employees from relying on the Constitution for redress of personal grievances.") (citing *Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1983)).

21. We note that Wicks brings this claim under 42 U.S.C. § 1981. Racial discrimination claims under this section also are subject to the defense of qualified immunity. See *Saunders v. Bush*, 15 F.3d 64 (5th Cir. 1994) (barring section 1981 claim due to absolute and qualified immunity of defendants). Although the heightened pleading standard enunciated in *Elliot* has been applied only in the context of section 1983 claims, the rationale of that decision applies to all civil rights actions where the defense of qualified immunity is asserted. An immunity from suit does not vary with the statutory basis for that suit, and as we said in *Elliott:*

> [W]e conclude that allowing broadly-worded complaints, such as those of the plaintiff s here, which leaves to traditional pretrial depositions, interrogatories, and requests for admission the development of the real facts underlying the claim, effectively eviscerates important functions and protections of official immunity.

> employees in a less favorable fashion than white employees, and her adverse comments about Plaintiff, based upon race and based upon Plaintiff's protesting unjustified employment actions against him, was also a proximate cause of Plaintiff's not getting the promotion.

Again, Wicks makes only broad and wholly conclusional allegations that Cook discriminated against him on the basis of race. While Wicks does allege racial animus, an element of the *prima facie* case for his discrimination claim, he fails to allege any conduct of Cook that could be considered to "violate a clearly established statutory ... right."[22] At best, Wicks states the conclusion that his race is the cause of any adverse comments Cook may have made. Wicks must allege particular facts showing behavior by Cook motivated by racial animus. To merely make the charge is insufficient; the complaint must "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."[23] Wicks' complaint is devoid of such detail; accordingly, we conclude that Wicks has failed to state a racial discrimination claim sufficient to overcome Cook's defense of qualified immunity.

Because we find that Wicks failed to meet the threshold pleading requirements for either of his claims, we hold that *any* discovery by Wicks, even that limited in scope, is improper and immediately appealable as a denial of the benefits of the qualified immunity defense. Because of this disposition of the discovery issue, we need not address whether the immunity defense sufficiently turned on a factual issue requiring discovery under *Lion Boulos*. Moreover, we need not address Cook's contention that the discovery order was overly broad.

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22. *See Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1219 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010, 108 S.Ct. 709, 98 L.Ed.2d 660 (1988) (holding that section 1981 claim requires direct or circumstantial evidence of purposeful discrimination).

751 F.2d at 1476. Thus, Wicks must meet the heightened pleading standard for his section 1981 claim as well as his section 1983 claim.

23. *Elliott*, 751 F.2d at 1473.

We are aware that by requiring heightened pleading before discovery some plaintiffs will be unable to state a claim. But, as noted in the concurring opinion in *Elliott*, the "denial of some meritorious claims is the direct product of the immunity doctrine which weighed these losses when it struck the policy balance."[24] The seeming unfairness of this conclusion is tempered by this circuit's directives to allow a plaintiff initially failing to state a claim the opportunity to amend or supplement the pleadings freely, so that he may state his best case.[25] Where the plaintiff has filed only one pleading, as Wicks has here, immediate dismissal ordinarily is not justified.[26] Thus, on remand, Wicks should be given an opportunity to plead his case properly before dismissal is considered.

The denial of Cook's request for a protective order preventing all discovery until consideration of the motion to dismiss is REVERSED and the request is GRANTED. We REMAND to the district court for consideration of the motion to dismiss in a manner consistent herewith.[27]

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24. *Id.* at 1483.
25. *Jacquez.*
26. *Id.* at 792.
27. Cook asks this court to hold that a motion to dismiss must be considered prior to the allowance of any discovery. We disagree. While we hold today that *Lion Boulos* requires a preliminary consideration of the pleadings prior to the allowance of discovery on the issue of qualified immunity, this inquiry need not result in a ruling on a motion to dismiss. Indeed, *Lion Boulos* illustrates a situation where a plaintiff satisfies the heightened pleading but alleges facts upon which the immunity defense turns which are disputed by the defendant. In such a situation, *Lion Boulos* held that discovery limited to the issue of the immunity defense could proceed "before ruling on a defendant's motion to dismiss..." 834 F.2d at 507. Thus, we impose no requirement that the district court must rule on a motion to dismiss prior to the allowance of discovery in all situations. Rather, we hold simply that if the pleadings fail to state facts sufficient to overcome the defense of qualified immunity, then limited discovery is improper and dismissal, as qualified above, is in order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GEORGE WICKS, SR.,
Plaintiff,

v. NO. 1:94CV2-S-D

MISSISSIPPI STATE EMPLOYMENT SERVICE
AND HAZEL COOK,
Defendants

ORDER OVERRULING OBJECTIONS AND AFFIRMING MAGISTRATE JUDGE'S ORDER ALLOWING LIMITED DISCOVERY

On April 22, 1994, the magistrate judge issued an order staying all discovery in this case pending a ruling on defendant Cook's motion to dismiss, with one exception--he allowed limited discovery on the question of qualified immunity. This cause is now before the court on Cook's objections to that order. As grounds for her objections, Cook charges that the order is clearly erroneous and contrary to law and is overbroad.

Neither of these arguments is persuasive. It has long been this court's practice, in accordance with well established law, to stay discovery in cases raising the defense of qualified immunity with the narrow exception as allowed by the magistrate judge. As recently reaffirmed by the by the Fifth Circuit, qualified immunity "is an issue that may ordinarily be resolved no later than after preliminary discovery specifically related to qualified immunity." *Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993) (citing *Anderson v. Creighton*, 483 U.S. 635, 647 n.6 (1987)) (emphasis added). This, of course does not mean that the issue will be resolved on the front end of litigation, only that it should be if possible. *See, e.g., Presley*, 4 F.3d at 410 ("if...there remain disputed issues of material fact relative to immunity, the jury, properly

instructed, may decide the question").

The court wholly rejects Cook's alternative suggestion that only this court, not the magistrate judge, can order limited discovery on the immunity issue. This argument completely overlooks the primary role of the magistrate judge in this district, which is to oversee all aspects of discovery; only in extraordinary circumstances does this court ever become involved in discovery matters, and this is not one of those times. The court further rejects Cook's suggestion that the magistrate judge's order is overbroad and that the court should "limit the number of interrogatories, requests for admission and depositions that the Plaintiff may use." Neither this court nor the magistrate judge is here to practice law for the parties, and counsel for plaintiff is well aware of the contours of the magistrate judge's order and the track on which this case has been placed pursuant to the Civil Justice Reform Act. If at any time during this limited discovery period Cook believes that plaintiff has exceeded the boundaries of that order, she certainly may pursue an appropriate protective order from the magistrate judge. Finally, the court notes that these objections, which are not supported by the law (and have been repeatedly rejected, *see e.g., Wood v. Richardson,* No. 1:93CV374-D-D (N.D. Miss. Apr. 6,1994) (Memorandum Opinion and Order affirming order allowing limited discovery on question of qualified immunity)) waste scarce judicial resources and do nothing "to secure the just, speedy, and inexpensive determination" of this action. Fed. R. Civ. P.1.

Accordingly, it is ORDERED:

That defendant Hazel Cook's objections to the magistrate judge's order are not well taken and are overruled, and the magistrate judge's order allowing limited discovery on the qualified immunity issue is hereby affirmed.

SO ORDERED this 2nd day of May, 1994.

/s/_____

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GEORGE WICKS — PLAINTIFF

V. — NO. 1:94CV0002-S-D

MISSISSIPPI STATE EMPLOYMENT SERVICE
AND HAZEL COOK — DEFENDANTS

ORDER HOLDING DISCOVERY IN ABEYANCE

Defendants have filed a dispositive motion in this cause raising the defense of qualified immunity and have also filed a motion to hold discovery in abeyance pending a ruling on their dispositive motion. The court finds that discovery should be held in abeyance pending a ruling on the issue of qualified immunity, but that limited discovery on the issue of qualified immunity should be allowed as a matter of fundamental fairness. Accordingly, it is ORDERED that discovery in this cause is held in abeyance pending a ruling on the issue of qualified immunity. However, plaintiff may conduct limited discovery on this issue of qualified immunity. A case management order will be entered upon the resolution of the qualified immunity issue.

SO ORDERED, this the 22nd day of April, 1994.

/s/_____
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

No. 91-1616

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GEORGE WICKS,
Petitioner,

v.

MISSISSIPPI EMPLOYMENT SERVICE
and HAZEL COOK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
REASONS WHY THE PETITION SHOULD BE DENIED	5
I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE SUPREME COURT'S PRECEDENT AND CLOSELY PARALLELS THIS COURT'S DECISION IN *SIEGERT v. GILLEY*, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991)	5
II. THE FIFTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH *LEATHERMAN v. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT*, 507 U.S. ——, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)	6
III. THE INSISTENCE THAT A PLAINTIFF PLEAD MORE THAN CONCLUSIONS WAS RECENTLY REAFFIRMED BY THE FIFTH CIRCUIT IN A MODIFIED VERSION AS ARTICULATED IN *SCHULTEA v. WOOD*, 47 F.3d 1427 (5th Cir. 1995)	8
IV. ACTIONS BASED ON 42 U.S.C. § 1983 CHARGING RACIAL DISCRIMINATION REQUIRE THE ALLEGATION OF SPECIFIC FACTS	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Gomez v. Toledo, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980) 5

Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) 5, 7, 10

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. ——, 122 L.Ed.2d 517, 113 S.Ct. 1160 (1993) 3, 6

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 9

Mitchell v. Forsyth, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985) 7, 9

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 6

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 9

Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) 4, 8

Siegert v. Gilley, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991) 5

St. Mary's Honor Center v. Hicks, 509 U.S. ——, 125 L.Ed.2d 407 (1993) 9

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9

Wicks v. Mississippi State Employment Services, 41 F.3d 991 (5th Cir. 1995) ..... 3, *passim*

STATUTE

42 U.S.C. § 1983 ..... 3, *passim*

RULES

Fed. R. Civ. P. 7(a) 8

Fed. R. Civ. P. 9 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1616

GEORGE WICKS,

Petitioner,

v.

MISSISSIPPI EMPLOYMENT SERVICE
and HAZEL COOK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In the spring of 1992 an Office Manager III position was awarded to James G. Morgan. Petitioner George Wicks had applied for the job, but it was awarded to Mr. Morgan.

Wicks filed an action in the United States District Court for the Northern District of Mississippi against Hazel Cook, a former supervisor, and his employer, the Mississippi State Employment Service (MSES). Wicks alleged that because of his race, he was denied the job and it was awarded to a lesser qualified white person.

In April 1994, Cook filed a Motion to Dismiss or in the alternative, Motion for Summary Judgment based on qualified immunity and moved the court to hold discovery in abeyance pending action on the motion to dismiss.

In support of her motion, Cook filed an affidavit stating that:

(1) She had not been Wicks supervisor since 1990.

(2) She was an Office Manager I and that the Office Manager III position that Wicks applied for was in fact her supervisor and as such she was not consulted on the selection.

(3) The reprimands complained of by Wicks were based on his job performance.

The Magistrate Judge entered an order permitting discovery on the issue of qualified immunity. The District Judge affirmed the Magistrate's order.

Cook appealed the order permitting discovery to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed the district court's order permitting discovery and found that:

(1) Wick's allegations fail to suggest how Cook violated his clearly-established first amendment rights.

(2) The complaint discloses no basis for a finding that his charges about poor "write-up" are a matter of public concern and therefore his interest in commenting upon those matters is greater than the defendant's interest in promoting efficiency in delivery of public services.

(3) The allegation that his speech motivated Cook's tortious acts is wholly conclusionary.

(4) Wicks did not allege exactly what he believes Cook did to prevent his promotion.

(5) The complaint appears to be nothing more than an attempt to redress a personal grievance, a claim not generally actionable against a public employer.

(6) Wicks only makes broad and wholly conclusionary allegations that Cook discriminated against him on the basis of race.

(7) Wicks failed to allege any conduct of Cook that could be considered to "violate a clearly established statutory . . . right. *Wicks v. Mississippi State Employment Services,* 41 F.3d 991, 995-996 (5th Cir. 1995).

The Fifth Circuit found that Wicks had failed to meet the threshold pleading requirements for either of his claims and that any discovery is improper. *Id.* at 996.

The Court, on remand, stated that immediate dismissal is not justified and that Wicks should be given an opportunity to plead his case properly before dismissal is considered.

Respondents Mississippi Employment Service and Hazel Cook, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 41 F.3d 991 (5th Cir. 1995).

SUMMARY OF ARGUMENT

The Court of Appeals followed the decisions of this Court regarding discovery when it held that discovery was improper. Wicks failed to allege any conduct of Cook that could be considered to "violate a clearly established statutory right." This Court has repeatedly stated that until the threshold immunity question is resolved, discovery should not be allowed.

Petitioner Wicks takes the position that the Fifth Circuit decision is not consistent with *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. ——, 112 L.Ed.2d 517, 113 S.Ct. 1160 (1993). The law and facts of Wicks' case are not comparable to *Leatherman.* Cook as a state supervisor enjoys qualified immunity in § 1983 actions, while municipalities do not. This is a classic case of comparing apples and oranges and any comparison as to nonconformity is totally without merit. Qualified immunity is an immunity from suit and

as such requires an application quite different from a standard for a municipality in a § 1983 action.

The Fifth Circuit en banc in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995), while still embracing the requirement that complaints plead more than conclusions, no longer insists that a plaintiff fully anticipate the "qualified immunity" defense in his complaint at the risk of dismissal.

A plaintiff pleading a case of discrimination against a defendant, who enjoys qualified immunity, is not granted a license to ignore the immunity standards. The cases cited by Wicks as unreconcilable with the Fifth Circuit decision do not involve the qualified immunity defense; therefore, are not a correct measure to make a comparison. *Harlow* recognizes the right not to be burdened by litigation until the "conduct complained of" is shown to violate clearly established law, no exception is made for discrimination cases.

This case has been remanded to the district court to allow amendment. The conduct of which Wicks complains can be plead and the substantive rights of both parties will be acknowledged.

The Supreme Court has stated its position on qualified immunity several times in the past and the Circuit Courts should be allowed to work out the minor procedural details before this Court considers the issue again.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE SUPREME COURT'S PRECEDENT AND CLOSELY PARALLELS THIS COURT'S DECISION IN *SIEGERT v. GILLEY*, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991).

In *Siegert v. Gilley*, 500 U.S. at 231, once again the Supreme Court addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity when it stated:

> Qualified immunity is a defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980); *Harlow*, 457 U.S. at 815, 73 L.Ed.2d 396, 102 S.Ct. 2727. Once a defendant pleads a defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the current applicable law, but whether the law was clearly established at the time an action occurred. . . Until this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 818, 73 L.Ed. 2d 396, 102 S.Ct. 2727.

This Court found in *Siegert*, 500 U.S. at 233 that Siegert not only failed to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all. As in *Siegert*, the Circuit Court found that Wicks fails to allege any conduct of Cook that could be considered to "violate a clearly established statutory right."

The Court further stated while discussing why discovery should not be allowed that: "This case demonstrates the desirability of this approach to a claim of immunity." *Siegert, id.* at 233.

There is a remarkable similarity between Petitioner Wicks' case and *Siegert*, with the Fifth Circuit applying the law as outlined by the Supreme Court.

II. THE FIFTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH *LEATHERMAN v. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT*, 507 U.S. ——, 113 S.Ct. 1160, 122, L.Ed.2d 517 (1993).

Wicks urges this court to grant his petition because the Fifth Circuit's heightened pleading rule is inconsistent with *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. ——, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Petition for Certiorari at 4.

The Fifth Circuit's rule is not contrary to *Leatherman*. As stated in the Petition for Certiorari at 2, this is an action against the Mississippi State Employment Service and an employee, Hazel Cook. The Court stated in *Leatherman*, 113 S.Ct. at 1162, citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978), "Municipalities do not enjoy absolute or qualified immunity from § 1983 suits."

Leatherman involved an action against a municipality, an important distinction considering Petitioner Wicks' allegation that the Fifth Circuit's decision is inconsistent with the *Leatherman* precedents. Wicks is in fact an action against the state and a state's employee. To be more specific, this Writ is in response to a Fifth Circuit's decision in reply to two motions contemporaneously filed by the separate defendant Cook, who enjoys qualified immunity.

Since *Leatherman* applies to municipalities which do not enjoy qualified immunity, the Fifth Circuit's decision can not be contrary to precedents set forth in said case as alleged by Wicks.

Indeed, this distinction is recognized by this Court in *Leatherman* when stating:

> First, respondents claim that municipalities' freedom from respondent superior liability, necessarily includes immunity from suit. In this sense, respondents assert, municipalities are no different from state or local officials sued in their individual capacity. . .
>
> This argument wrongly equates freedom from liability with immunity from suit.

Id. at 1162.

The Fifth Circuit's pleading standards are in harmony with this Court's ruling in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). In *Harlow* the court stated that:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold question is resolved, discovery should not be allowed.

Harlow, 73 L.Ed.2d at 411.

The *Harlow* decision was reaffirmed in *Siegert, supra*, and therefore the Court of Appeal's decision is in line with this court's precedent.

The distinction between *Leatherman* (Municipality with no immunity) and *Wicks* (individual with qualified immunity) is obvious in light of this courts statement that: "The entitlement (qualified immunity) is an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985).

III. THE INSISTENCE THAT A PLAINTIFF PLEAD MORE THAN CONCLUSIONS WAS RECENTLY REAFFIRMED BY THE FIFTH CIRCUIT IN A MODIFIED VERSION AS ARTICULATED IN *SCHULTEA v. WOOD*, 47 F.3d 1427 (5th Cir. 1995).

The "heightened pleading" is the balancing act pitting a plaintiff's rights to challenge government action against public officials' rights to be free of the difficulties of the discovery process. This balancing act is best represented by the requirements of the Fifth Circuit as represented by its decision in Wicks and subsequently modified in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995).

On March 9, 1995, the Fifth Circuit en banc revisited its "heightened pleading" standard in *Schultea*, stating:

> We stand by our insistence that complaints plead more than conclusions, and that a plaintiff can, at the pleading stage, be required to engage the affirmative defense of qualified immunity when invoked. However, we will no longer insist that plaintiff fully anticipate the defense in his complaint at the risk of dismissal under Rule 12.

Id. at 1430.

The Court chose to no longer rely on the particularity requirements of Rule 9 of the Fed. R. Civ. P., but instead chose to require a reply, pursuant to Rule 7(a), to an answer raising the qualified immunity defense in his complaint.

As stated by the Court the ultimate outcome of a confrontation between Rule 9(b) and qualified immunity no longer need be decided.

The district court is required to insist that a plaintiff suing a public official under § 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone.

Once the affirmative defense of qualified immunity is raised, the Court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail.

The district court may ban discovery at this threshold pleading stage and may limit any necessary discovery to the defense of qualified immunity.

Wicks need only to follow the direction of the Circuit Court and taking advantage of the Court's directives, amend his pleadings making a plain and short statement that rests on more than conclusions. This solution appears not to be overly oppressive to Wicks. A Writ of Certiorari to this Court when such a simple solution is available seems to be an excessive measure.

IV. ACTIONS BASED ON 42 U.S.C. § 1983 CHARGING RACIAL DISCRIMINATION REQUIRE THE ALLEGATION OF SPECIFIC FACTS.

Petitioner complains that the Fifth Circuit's holding cannot be reconciled with this Court's precedents as to how a racial discrimination case may be proved. Petition for Certiorari at 5. Wicks cites as authority *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 240 (1981); *McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 125 L.Ed.2d 407 (1993). The cases cited consist of employers who do not enjoy qualified immunity.

This Court has historically recognized that public officials require qualified immunity to protect them from undue interference with their duties and threats of liability.

In *Mitchell v. Forsyth* the court stated:

> Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essential legal question whether the conduct of which the plaintiff complains violated clearly established law.

472 U.S. 511, 526, 86 L.Ed.2d 411, 105 S. Ct. 2806 (1985).

The key phrase is "conduct of which plaintiff complains." It is obvious that when pleading a case of discrimination against one who enjoys qualified immunity, it must be taken a step further to adhere to the directives in *Harlow, supra.*

The Fifth Circuit has not negated a method for proving discrimination as claimed by Wicks. The pleadings standard which requires the specific "conduct" to be plead is not unlike pleading any other case against a public official. To lessen the disruptive effect that a volume of litigation would have on public officials and the resulting effect on their duties, a certain allegation of conduct must be plead.

The Circuit Court in an expansive reading of the complaint found that Wicks' allegations fail to suggest how Cook violated his clearly-established first amendment rights. That it appeared to be nothing more than an attempt to redress a personal grievance, a claim not generally actionable against a public employer, and made only broad and wholly conclusionary allegations that Cook discriminated against him on the basis of race. *Wicks, supra,* at 995, 996.

The complaint of the petitioner is totally void of the "conduct" of Cook which establishes a violation of right.

CONCLUSION

The Court has indeed "been over most of this ground before," and Respondents submit there is not need to do so again. The Petitioner has an ample remedy. The case has been remanded to the District Court with directions to allow the Petitioner to amend his pleadings and further the court has outlined the areas that need to be amended.

The Fifth Circuit ever cognizant of the need to improve and develop a better procedure to even the balancing act

required when two substantive rights collide, has changed its required pleading standard; thus, has achieved a very workable alternative. This new standard gives equal attention to the conflicting rights of both parties. Accordingly, for the reasons set forth in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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